UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

TXU GENERATION COMPANY, LP **Glen Rose, Texas**

Employer

and **Case 16-RD-1534**

RICHARD HASEGAWA, an Individual

Petitioner

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 20

Union

DECISION AND DIRECTION OF ELECTION

The Employer, TXU Generation Company, LP, is a Texas limited partnership with an office and a place of business in Glen Rose, Texas, engaged in the business of providing electrical services to approximately one-third of the citizens of the State of Texas. On April 27, 2005, the Petitioner, Richard Hasegawa, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking an election to decertify the International Brotherhood of Electrical Workers (IBEW), Local Union 20, the Union, as the representative of certain employees of the radiation protection and chemistry departments of the Employer. A hearing officer of the National Labor Relations Board conducted a hearing in this matter on May 11, 2005. Following the hearing, the Employer and IBEW, Local 20 filed briefs with me.

I. ISSUE

This case presents the issue of whether the parties' collective bargaining agreement, hereinafter Contract, has a fixed term as such would bar the instant petition. For the reasons set forth below, I find that the parties' Contract does not bar the instant petition because at the time of the filing of the instant petition, it was terminable at will by either party after the date of expiration and therefore of indefinite duration.

II. FACTS

The unit in the instant case includes approximately 55 chemistry and radiation protection employees who work at the Comanche Peak Steam Electric Station, a two-unit nuclear power plant. Chemistry technicians are responsible for maintaining proper water chemistry for the plant's nuclear systems and secondary steam supply system. Radiation protection technicians are responsible for tracking incidents of employee radiation exposure and radiation levels within the plant.

The Contract at issue in this case was effective from April 26, 2004 through April 26, 2005. Previously, the parties entered into a collective bargaining agreement covering the period from May 26, 2001 through April 30, 2004.[1] TXU terminated the contract in April 2003. The employees covered under such contract worked without a contract from April 2003 until May 2004, when the parties entered into the Contract at issue in the instant case. Article I of the 2004-2005 Contract provides in relevant part:

> **Section 1. Effective Period:** This Agreement shall become effective as of April 26, 2004. The expiration date for the Agreement shall be April 26, 2005. It shall continue in effect thereafter from year to year, unless sixty (60) days written notice of desire to change is given prior to any expiration date by either party to

[1] The record identified the parties to this contract as "TXU Electric Company, CPSES Nuclear Generation and International Brotherhood of Electrical Workers, Local 2337."

this Agreement and notice to terminate is given as provided in Section 3 Continuation of Contract. All changes desired will be submitted in writing by either party to the other party sixty (60) days prior to the expiration date.

Section 3. Continuation of Contract: It is agreed that in the event written notice to change or terminate this Agreement has been given by either party, and in the event a new Agreement has not been negotiated and executed prior to the expiration date, this Agreement shall continue in effect. In order to terminate this Agreement, either party must give at least sixty (60) days written notice to the other party after the expiration date and state the intention to terminate the Agreement. During such notice period, the parties shall continue to negotiate and the Agreement shall remain in effect for such extended period.

The Union notified the Employer by letter dated February 7, 2005 that it desired to open negotiations in accordance with Article I, Sections 1, 2 & 3 of the Contract. The letter included a general statement by the Union that it proposed changes to Articles I through X. The Employer responded by letter dated February 14, 2005 that it welcomed the opportunity to negotiate changes. Negotiations were ongoing as of the date of this hearing. The parties stipulated that after the Contract expired on April 26, 2005, the Contract continued in effect.

III. BARGAINING HISTORY

The record reflected that the parties previously entered into a collective bargaining agreement effective January 17, 1985 through January 16, 1986, which covered certain employees of the Employer, including reactor operators. The continuation provisions in Sections 1 and 3 of the 1985-1986 contract mirror those in the instant Contract except that the parties were required to give only fifteen (15) day notice of termination instead of sixty (60) days. On March 26, 1986, a group of reactor operators filed a petition seeking to be represented by a labor organization other than International Brotherhood of Electrical Workers (IBEW), Local Union 2337, the labor organization that was a party to the 1985-1986 contract covering the reactor

operators. The initial issue considered by the Regional Director in that case was whether the 1985-1986 contract barred the petition. Relying on ***Crompton Company***, 260 NLRB 417 (1982), the Regional Director found that the contract did not bar the petition as it was of an indefinite duration at the time the petition was filed.[2]

The evidence revealed that with regard to previous contracts, the parties routinely submitted letters of notice of intent to bargain within the period defined in the contract. If the parties completed negotiations after the expiration date of the Contract, the Contract continued in force and effect until agreement was reached or until a party exercised its option to terminate the Contract. The record reflected one instance where the parties did not reach agreement by the expiration date of the Contract, and the Employer provided notice to the Union that it was terminating the Contract under Article I, Section 3.[3]

IV. ANALYSIS

This case presents the issue of whether the parties' Contract has a fixed term, as such would bar the instant petition. The Union contends that under ***KCW Furniture Company***, 247 NLRB 541 (1980), upon the expiration of the parties' Contract, an evergreen clause effectively renewed the Contract for a term of one year, and therefore, the Contract is not of an indefinite duration and it bars the instant petition. The Employer asserts that ***Pacific Coast Assn. of Pulp & Paper Mfgs.***, 121 NLRB 990 (1958) and ***Crompton Company Inc.***, 260 NLRB 417 (1982) support a finding that upon expiration of the Contract, either party could elect to terminate the

[2] Decision and Order, ***Texas Utilities Generating Company***, 16-RC-8848 (May 15, 1986).

[3] The Employer terminated the contract effective April 22, 2003, by letter dated April 7, 2003. The 2001-2004 contract provision regarding termination is identical to the provision in the current contract at issue in this case. Although the contract required 60 days notice to terminate following the expiration date, the Employer provided only 15 days notice. The record did not reflect that the notice of termination was defective. Further, this evidence alone does not demonstrate that the termination provision in the Contract at issue in this case operates in a manner other than the manner mutually described by the parties in this case.

Contract by providing sixty (60) days notice, and the Contract does not specify a timeframe during which the parties must exercise the termination right. The Employer contends that at the time the petition was filed—upon expiration of the Contract—the Contract was of indefinite duration and therefore does not bar the instant petition.

In ***Texas Utilities Generating Company***, 16-RC-8848, the Regional Director relied on ***Crompton Company Inc.***, 260 NLRB 417 (1982) to find that a previous collective bargaining agreement between the parties in this case, with virtually identical effect and continuation provisions, was a contract of indefinite duration.[4] In ***Crompton Company Inc.***, the Board considered whether an extension agreement entered into by parties to a collective bargaining agreement barred a petition filed by a labor organization. The parties executed an agreement that extended the existing collective bargaining agreement by two months. The extension agreement provided that if the parties reached agreement on a new contract before that date, the new contract would supersede the extension agreement. The Board found that the extension agreement was "indefinite because it was intended to be effective until February 1, 1982, or any prior date if there was agreement by the parties on a new contract." *Id.* at 418. The Board reasoned that the condition subsequent in the extension agreement altered the contract to one with no fixed term, and potential petitioners were consequently not apprised of the open period during which a petition could be filed. *Id.*

As the Union correctly asserts, unlike ***Crompton Company Inc.***, the instant case does not involve an extension agreement. However, the principles relied upon by the Board in ***Crompton Company Inc.*** may be equally applied to a case such as the case at hand, where a contract renewal clause, or evergreen clause, includes a condition subsequent that renders the Contract

one of indefinite duration. Here, the renewal clause provided that following the Contract's expiration, either party could terminate the Contract, apparently at any time upon sixty (60) days notice to the other party. In the instant case, like in ***Crompton Company Inc.***, the Contract does not provide a definite expiration date because the parties may terminate the Contract at any time following its expiration; therefore, those wishing to file a representation petition are not apprised of the open period. Under ***Crompton Company Inc.***, the Contract in the instant case does not bar the petition, because at the time the petition was filed—following the expiration date of the Contract—the termination provisions rendered the Contract of indefinite duration.

The contract bar principles set forth in ***Pacific Coast Assn. of Pulp & Paper Mfgs.***, 121 NLRB 990 (1958) support a finding that the Contract in the case at hand does not bar the instant petition because it has no fixed duration as it is terminable at will. In ***Pacific Coast Assn. of Pulp & Paper Mfgs.***, a representation case in which the Board reexamined and revised contract bar principles which still apply today, the Board concluded, "contracts having no fixed duration shall not be considered a bar for any period." *Id.* at 993. With regard to contracts terminable at will, the Board reasoned:

> We believe that our contract-bar policy should rest on the fundamental premise that the postponement of employees' opportunity to select representatives can be justified only if the statutory objective of encouraging and protecting industrial stability is effectuated thereby. That objective is served where contracting parties have entered into mutual and binding commitments thereby reasonably insuring that for the duration of the agreement neither party will disrupt the bargaining relationship by unilaterally attempting to force changes in the conditions of employment upon the other. But to grant the protection of our contract bar policy to parties which have not so committed themselves--either party being free at all times to dissolve the contract and exert economic pressure upon the other in support of bargaining demands--would be to abridge the statutory right of employees to select representatives without concomitant statutory justification. *Id.* at 994.

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[4] Decision and Order, ***Texas Utilities Generating Company***, 16-RC-8848 (May 15, 1986). The Regional Director dismissed the petition for reasons unrelated to the ***Crompton*** analysis, i.e., a finding that severance of the reactor operators from the current bargaining unit was inappropriate.

The Board applied this policy in ***Pacific Motor Trucking Co.***, 132 NLRB 950 (1961) to a collective bargaining agreement that was terminable at will by either party at any time.

Here, the parties have not committed that for a specific duration neither party will disrupt the bargaining relationship. The parties included a provision in the Contract that allowed for the termination of the Contract by either party upon sixty (60) days notice following the expiration of the Contract, with no specific time during which the parties are required to exercise such option. Therefore, following the expiration date of the Contract, the renewed Contract became a contract terminable at will. This termination provision leaves the parties free to terminate the Contract and exert economic pressure on the other in support of bargaining demands at any time following the Contract's expiration. Therefore, to grant the protection of the Board's contract bar policy would abridge the statutory rights of the Petitioner who sought an election by filing a petition on the day following the expiration of the Contract, within the timeframe he perceived to be an open period. As the Contract in the case at hand is a contract terminable at will upon the date of its expiration, and is therefore of indefinite duration, it does not bar the instant petition. ***Pacific Coast Assn. of Pulp & Paper Mfgs.***, 121 NLRB 990 (1958); ***Pacific Motor Trucking Co.***, 132 NLRB 950 (1961).

Contrary to the Union's assertion, ***KCW Furniture Company***, 247 NLRB 541 (1980) is inapplicable to the facts in this case. The Board in ***KCW Furniture Company*** considered whether the employer unlawfully implemented unilateral changes, not whether the parties' collective bargaining agreement barred a petition. The narrow issue in ***KCW Furniture Company*** was whether the parties' collective bargaining agreement automatically renewed. In the instant case, the parties stipulated that the Contract continued in effect following its

expiration. The Board in ***KCW Furniture Company*** did not consider the issue before me—whether the contract was for a fixed or indefinite duration.

KCW Furniture Company is also distinguishable from the instant case based on the termination provisions of the contract in ***KCW Furniture Company***, which were executable *prior* to the expiration of the contract. By its terms, the contract "renewed itself on a year by year basis unless timely notice of termination was given or the parties mutually agreed to terminate it." ***KCW Furniture Company***, 247 NLRB 541 (1980). The Board concluded that the parties failed to exercise their option to terminate the contract, and by their omission effectively renewed the contract. The contract language in ***KCW Furniture Company*** provided two distinct courses of conduct in the event the parties failed to achieve a new contract prior to the current contract's expiration date: (1) provide notice or agree to terminate the agreement prior to its execution; or (2) take no action to terminate the agreement, which effectively renewed the contract for another year. ***KCW Furniture Company***, 247 NLRB 541 (1980). This construction provides for a definite expiration date in the event the parties fail to reach agreement prior to the expiration of the contract. In the instant case, the termination provisions of the contract are executable at any time *following* the Contract's expiration date, which does not provide a definite expiration date in the event the parties fail to reach agreement prior to the expiration of the contract.

Finally, the Union contends that the Petitioner should have filed the petition within the window period more than sixty (60) days but less than ninety (90) days before the expiration of the contract. This rule applies to the period for filing with respect to existing contracts. *National Labor Relations Board, An Outline of Law and Procedure, Chapter 9, Contract Bar, 9-550, The Period for Filing*; ***Leonard Wholesale Meats***, 136 NLRB 1000 (1962). Although the Union is accurate regarding the period for filing prior to the expiration of a contract, their argument does

not address the issue in this case—whether the existing Contract continued in effect *indefinitely* following its expiration, which would render the Contract ineffective as a bar.

Based on the foregoing, I find that at the time the instant petition was filed, the parties' Contract was terminable at will, and therefore of indefinite duration. Accordingly, the Contract does not bar the instant petition.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated and I find that the Employer, TXU Generation Company, LP, a Texas limited partnership with an office and a place of business in Glen Rose, Texas, is engaged in the business of providing electrical services to approximately one-third of the citizens of the state of Texas. During the past 12 months, the Employer has received goods and services valued in excess of $50,000 from points located directly outside the State of Texas. Based on the foregoing, I find the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that the International Brotherhood of Electrical Workers (IBEW), Local Union 20, represents all radiation protection technicians, including lead technicians, and all chemistry technicians, including lead technicians,

employed by the Employer at the Comanche Peak Steam Electric Station at Glen Rose, Texas.

4. The parties stipulated to the petitioner's status as a labor organization.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All radiation protection technicians, including lead technicians, and all chemistry technicians, including lead technicians, employed by the employer at the Comanche Peak Steam Electric Station at Glen Rose, Texas.
EXCLUDED: All other employees, including guards, supervisors, and clerical employees as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Brotherhood of Electrical Workers (IBEW), Local Union 20.

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees

engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized

the election.

To be timely filed, the list must be received in the Fort Worth Regional Office, Federal Office Building, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102 on or before June 2, 2005. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 817-978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request

for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on June 9, 2005. The request may not be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded a list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file on of these documents electronically, please refer to the attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance may also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Dated: May 26, 2005

/s/ Curtis A. Wells

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